

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SILGAN CONTAINERS CORP.,

Plaintiff,

No. C 08-2246 PJH

v.

**ORDER GRANTING SUMMARY
JUDGMENT IN PART AND DENYING
SUMMARY JUDGMENT IN PART**

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA,

Defendant.

The parties' cross-motions for partial summary judgment and plaintiff's motion to strike came on for hearing before the court on January 21, 2010. Plaintiff Silgan Containers Corporation ("Silgan" or "plaintiff"), appeared through its counsel, Loren Kieve. Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union" or "defendant"), appeared through its counsel, Richard Nicolaides. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS defendant's motion and DENIES plaintiff's motion, for the reasons stated at the hearing, and as follows.

BACKGROUND

This action stems from an insurance dispute. Silgan manufactures and sells steel and aluminum containers with "pull-tab" lids. These containers are used by processors and packagers for food products. See Joint Statement of Undisputed Facts ("SUF"), ¶ 44. One of Silgan's customers is Del Monte, and the two companies had a supply agreement in place (dating back to 1993) that obligated plaintiff to provide 4 oz pull-tab fruit cups to Del Monte, for its use in packaging ready to go fruit for consumers. See id., ¶ 3.

1 A. Background Facts

2 During the relevant time period, Silgan supplied Del Monte with a number of batches
3 of pull-tab cans that did not function properly. Specifically, customers could not readily pull
4 the tops off the cans, and Del Monte received increasing numbers of customer complaints
5 about the issue. Id., ¶¶ 5-9, Exs. 4-10. Del Monte notified Silgan of the pull-tab failure
6 rates on June 24, 2004, and then again in August 2004. SUF, ¶¶ 7, 9, Exs. 4-5. Del Monte
7 ended up reporting a total of 272 complaints received during the month of July 2005, and
8 5,100 broken pull-tab complaints during the 2005 fiscal year as a whole. See id., ¶¶ 12-13.

9
10 Silgan investigated the claims, and determined that various factors related to design
11 and manufacture of the pull-tab lids were causing “openability” problems. Id., ¶¶ 16, 20;
12 Exs. 11, 15.

13 As a result, Del Monte informed Silgan in May 2005 that Del Monte planned to reject
14 Silgan’s products given the high failure rates, and Del Monte’s inability to cost-effectively
15 sort the good cans from the bad ones. SUF, ¶ 25, Ex. 14. As of August 14, 2006, Del
16 Monte insisted that all remaining inventory be removed and disposed. Id., ¶ 26, Ex. 18.
17 Del Monte subsequently disposed of the fruit cup products it rejected due to high defect
18 rates. Id., ¶ 29.

19 Del Monte sought to recover from Silgan the costs it had incurred as a result of the
20 defective cans supplied by Silgan. These costs initially included costs of fruit that was lost
21 as a result of rejected products, the costs of sorting, and costs incurred by Del Monte’s
22 Chinese co-packers of mandarin oranges, since there was a delay in shipping non-
23 defective cans to China, which required Del Monte to purchase more expensive “off
24 season” mandarin oranges. SUF, ¶ 30, Ex. 19. All told, Del Monte’s initial claim for
25 damages totaled \$6,532,081.20, which claim included the following breakdown of costs:

- 26 • \$4,190,366.45 for the value of finished fruit cup products (pineapples,
27 peaches, pears and mixed fruit) that were rejected, including the value of the
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fruit, value of the cans and related costs of packaging, manufacturing and/or assembling such products;

- \$790,803.08 for the value of finished fruit cup products that required special handling (including the value of fruit, value of the cans, and costs of packaging, manufacturing and/or assembly);
- \$535,161.68 for the value of finished fruit cup products (cherry mixed fruit), and related costs;
- \$343,070.64 for costs incurred to inspect, gather, sort, and segregate fruit cup products utilizing defective pull-tab tops, and costs incurred to process, rework and dispose such products;
- \$646,177.04 for China “reman premiums” – representing the price premiums incurred by Del Monte due to the delay in re-shipping non-defective cans to China and missing the opportunity to pack fresh mandarin oranges in China; and
- \$26,502.31 for consumer reimbursements.

See SUF, ¶ 31, Ex. 20.

A subsequent audit of Del Monte’s damages claim, conducted by a third party forensics firm hired by National Union, revealed that Del Monte’s damages claim totaled \$6,500,956.27, and includes the following relevant break out of individual items:

- \$1,811,881.67 for the cost of cans manufactured by Silgan and sold to Del Monte
- \$1,017,251.74 for the cost of fruit that was contained in the affected cans
- \$1,404,776.21 in variable manufacturing costs (including costs incurred in filling cans with fruit, labor, utilities, and packaging costs for labels and boxes)
- \$10,522.98 in other variable costs, including the additional freight and warehousing costs required to get replacement inventory into distribution centers

- \$276,356.17 in LIFO (last in, first out) adjustment
- \$964,417.51 in fixed overhead costs (rent, depreciation, labor, etc.)
- \$1,990.04 in unsupported cost (sorting and rework costs lacking support)
- \$341,080.60 in costs incurred in gathering defective fruit cups and in reworking and disposing of such products
- \$646,177.04 in China reman premiums (i.e., premiums incurred due to delay in re-shipping non-defective cans to China and missing the opportunity to pack fresh mandarin oranges)
- \$26,502.31 in consumer reimbursements paid to consumers in refunds and/or replacement products

See SUF, ¶ 33, Ex. 22.

In February 2005, August 2005, and May 2006, Del Monte unilaterally withheld payments otherwise owed to Silgan, in the amount of \$6,456,037, in order to cover the amount of damages Del Monte was claiming. SUF, ¶ 48. This was a lower amount than Del Monte's initial claim, which totaled \$6,532,081.20 and the audit claim, which totaled \$6,500,956.27. SUF, ¶¶ 31, 33.

B. Insurance Coverage

Silgan maintained two insurance policies that are relevant here. First, Silgan maintained a commercial general liability insurance policy issued by Zurich ("Zurich policy"), covering the period November 1, 2003 through November 1, 2004. SUF, ¶ 42, Ex. 24. The Zurich policy provided coverage up to \$1.5 million dollars for certain qualifying events, subject to a \$250,000 deductible. Id.

Second, defendant National Union also issued a commercial umbrella insurance policy to Silgan for the period November 1, 2003 to November 1, 2004 [i.e., the period during which the defective pull-tab cans were actually manufactured and supplied to Del Monte]. See SUF, ¶ 43, Ex. 25 ("National Union policy"). The National Union policy provides coverage, up to \$25 million, for certain "occurrences" that cause "property

1 damage” to Silgan, and covers only those sums in excess of a retained limit. See id.

2 Silgan gave timely notice of Del Monte’s fruit cup claim to both Zurich and National
3 Union. SUF, ¶ 49. On August 1, 2007, Zurich informed Silgan’s claim administrator that it
4 would accept Del Monte’s claim and pay the full \$1.5 million limit of Zurich’s primary
5 coverage, less Silgan’s \$250,000 deductible. Id., ¶ 46, Ex. 26.

6 National Union, for its part, retained a forensics accounting firm to audit Del Monte’s
7 claimed damages. SUF, ¶ 33. Based on the audit, it determined Del Monte’s damages to
8 be \$6,500,956.27 – a figure slightly lower than Del Monte’s stated claim for damages.
9 SUF, ¶ 31.

10 National Union has, however, denied coverage of Silgan’s claim, on grounds that
11 there has been no “physical injury” to the fruit that was contained in the defective fruit cup
12 containers.

13 C. The National Union Policy

14 An overview of the relevant affirmative and exclusionary coverage provisions of the
15 National Union policy is as follows:

16 1. Coverage Provisions

17 The National Union policy provides that National Union will pay “those sums in
18 excess of the Retained Limit that the Insured becomes legally obligated to pay” because of
19 “Property Damage... that takes place during the Policy Period and is caused by an
20 Occurrence happening anywhere in the world.” See SUF, ex. 25 at § I.

21 “Property Damage” is in turn defined as: (1) “physical injury to tangible property,
22 including all resulting loss of use to that property;” or (2) loss of use of tangible property
23 that is not physically injured.” See id. at § IV(K).

24 “Occurrence” is defined as: “an accident, including continuous or repeated exposure
25 to conditions, which results in ... Property Damage neither expected nor intended from the
26 standpoint of the Insured.” See id. at § IV(H).

27 2. Exclusions

1 The National Union policy also contains certain exclusions from coverage, three of
2 which are relevant to the parties' arguments here: (1) the Impaired Property Exclusion
3 (exclusion E); (2) the Your Product Exclusion (Exclusion F); and (3) the Product Recall
4 Exclusion (Exclusion H). See id. at § V.

5 Exclusion E excludes from coverage "any 'Property Damage' to 'Impaired Property'
6 that has not been physically injured, arising out of (1) a defect, deficiency inadequacy or
7 dangerous condition in Your Product...; or (2) a delay or failure by you or anyone acting on
8 your behalf to perform a contract or agreement in accordance with its terms." Id. at § V(E).
9 "Impaired Property" is in turn defined as: "tangible property, other than Your Product... that
10 cannot be used or is less useful because: (1) it incorporates Your Product... that is known
11 or thought to be defective, deficient, inadequate or dangerous; or (2) You have failed to
12 fulfill the terms of a contract or agreement; if such property can be restored to use by...
13 [t]he repair, replacement, adjustment or removal of Your Product...". SUF, ex. 25 at §
14 IV(D).

15 Exclusion F excludes from coverage "Property Damage to Your Product arising out
16 of it or any part of it." Id. at § V(F).

17 Finally, Exclusion H excludes from coverage "damages claimed for any loss, cost or
18 expense incurred by you or other for the loss of use ...removal or disposal of: (1) Your
19 Product; (2) Your Work; or (3) Impaired Property if such... product [] or property is
20 withdrawn or recalled from the market or from use by any person or organization because
21 of a known or suspected defect, deficiency, inadequacy, or dangerous condition in it." Id.
22 at § V(H).

23 D. The Instant Action

24 On April 30, 2008, Silgan filed the instant action against National Union (and a
25 subsequent amended complaint) alleging six causes of action: (1) breach of duty to
26 investigate; (2) breach of duty to pay; (3) breach of duty of good faith and fair dealing; (4)
27 breach of California Insurance Code § 790.03; (5) breach of duty to pay (as to Zurich only);
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1 and (6) declaratory judgment. See generally Amended Complaint. Silgan seeks
2 \$4,679,074.60 in damages for its unpaid claim.¹

3 The parties have now filed cross-motions for partial summary judgment. While
4 initially unclear from the parties' papers which causes of action are at issue for purposes of
5 the motions, at the hearing on the motions the parties clarified that they specifically seek
6 summary judgment with respect to the second claim for relief alleging contractual breach of
7 the duty to pay, and in addition, the fourth claim for relief alleging declaratory judgment, to
8 the extent plaintiff seeks a declaration regarding defendant's breach of the duty to pay.

9 Also pending before the court are two related motions to strike: plaintiff's motion to
10 strike the testimony of Thomas Richmann, and defendant's motion to strike the testimony
11 of Christopher Nettleton.²

12 DISCUSSION

13 A. Legal Standard

14 Summary judgment shall be granted if "the pleadings, depositions, answers to
15 interrogatories, and admissions on file, together with the affidavits, if any, show that there is
16 no genuine issue as to any material fact and that the moving party is entitled to judgment
17 as a matter of law." FRCP 56(c). Material facts are those which may affect the outcome of
18 the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to
19 a material fact is genuine if there is sufficient evidence for a reasonable jury to return a
20 verdict for the nonmoving party. Id. The court must view the facts in the light most
21 favorable to the non-moving party and give it the benefit of all reasonable inferences to be

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23 ¹ Silgan has discounted the \$1.5 million payment by Zurich, its own \$10,000
24 retention amount and another \$311,881 for the excess cost of cans (which National Union's
25 policy does not cover) from the original claim amount of \$6,500,956 that National Union
deemed to be the correct audited claim amount.

26 ² The court hereby DENIES both parties' motions to strike, as it finds that both the
27 declaration submitted by Christopher Nettleton and the affidavit submitted by Thomas
28 Richmann are admissible for purposes of the instant cross-motions. Notwithstanding this
ruling, however, the court furthermore notes that it need not rely on either the Nettleton
declaration or the Richmann affidavit in order to resolve the instant motions.

1 drawn from those facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
2 587 (1986).

3 The party moving for summary judgment bears the initial burden of demonstrating
4 the absence of a genuine issue of fact for trial. See Celotex Corp. v. Catrett, 477 U.S. 317,
5 323 (1986). When the moving party will have the burden of proof on an issue at trial, it
6 must affirmatively demonstrate that no reasonable trier of fact would find other than for the
7 moving party. On an issue for which the nonmoving party will have the burden of proof at
8 trial, the moving party need only point out “that there is an absence of evidence to support
9 the nonmoving party’s case.” Id. Once the moving party satisfies its initial burden, the
10 nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, “set
11 forth specific facts showing that there is a genuine issue for trial.” FRCP 56(e). If the
12 nonmoving party fails to make this showing, “the moving party is entitled to judgment as a
13 matter of law.” Celotex, 477 U.S. at 323.

14 B. The Parties’ Cross-Motions for Summary Judgment

15 Plaintiff’s summary judgment motion seeks a ruling that National Union was required
16 to provide coverage under the National Union policy as a result of the damages incurred by
17 Del Monte, in the amount of \$4,679,074.60. National Union, for its part, seeks a contrary
18 judgment that it had no duty to provide coverage under its policy. Resolution of the parties’
19 competing arguments ultimately requires analysis of the following issues: (1) whether the
20 affirmative coverage provisions of National Union’s policy provide coverage for Del Monte’s
21 damages claim; (2) whether, if so, certain policy exclusions nonetheless operate to bar
22 coverage; and (3) whether, if no exclusions apply, the \$1,500,00 retained limit set forth in
23 the policy was met, and policy coverage triggered, by properly recoverable damages under
24 the policy.

25 Preliminarily, however, the parties concede that there is no choice of law provision
26 contained within the National Union policy, but contend that the application of California law
27 is reasonable, given that Silgan’s operations are based in California, and the majority of
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1 defective fruit cup lids were sold to Del Monte in California. The court therefore applies
2 California law to the dispute in question, and furthermore notes that principles of California
3 contract interpretation – which apply to insurance contracts – also apply. See, e.g.,
4 MacKinnon v. Truck Ins. Exch., 31 Cal. 4th 635, 647 (2003)(court should construe all
5 insurance provisions in their ordinary and popular sense, and should construe them to give
6 effect to the policy as a whole, if possible).

7 The court now turns to the merits of the substantive issues in dispute.

8 1. Whether Coverage Applies under the National Union Policy

9 Silgan contends that the National Union policy covers Del Monte’s claim for
10 damages, because the loss of fruit contained within the pull-tab cups is qualifying “property
11 damage” that National Union is obligated to cover. Specifically, Silgan contends that,
12 consistent with the policy’s definition of “property damage,” the loss of fruit in the fruit cups
13 constitutes either “physical injury to tangible property, including all resulting loss of use to
14 that property” or “loss of use of tangible property that is not physically injured.” See SUF,
15 ex. 25 at § IV(K). National Union, by contrast, asserts that any loss arose from Silgan’s
16 breach of its supply contract with Del Monte, not from any physical injury to or loss of use
17 of fruit products.

18 The question to be resolved is therefore whether Del Monte’s loss of fruit in the pull-
19 tab cups can be considered “physical injury to tangible property,” or “loss of use of tangible
20 property” under the terms of the National Union policy, thereby triggering coverage in the
21 first instance.

22 Beginning with the former – i.e., whether the loss of Del Monte’s fruit can constitute
23 “physical injury” to tangible property – plaintiff argues that the fruit contained within the
24 defective fruit cups is “tangible property” that was “physically” injured because the defective
25 pull tab lids, which were incorporated together with the fruit itself, rendered the fruit
26 commercially useless. To that end, plaintiff relies on several cases that purport to establish
27 the proposition that ‘physical injury to tangible property’ – as that particular policy language
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is commonly understood – occurs whenever the incorporation of a defective product, through physical contact or physical linkage, renders a larger product potentially dangerous. See, e.g., Eljer Mfg. Inc. v. Liberty Mut. Ins. Co., 972 F.2d 805, 812 (7th Cir. 1992); see also Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1 (1996)(installation of asbestos-containing building materials in structure caused ‘physical injury’ to structure); Shade Foods, Inc. v. Innovative Prods. Sales & Marketing, Inc., 78 Cal. App. 4th 847 (2000)(wood-containing almonds sold to cereal manufacturer who used almonds to make cereal caused physical injury to cereal); Watts Indus. Inc. v. Zurich Am. Ins. Co., 121 Cal. App. 4th 1029 (2004)(waterworks parts containing high amounts of lead that leached into water system cause ‘physical injury’ to water system).

As defendant correctly notes, however, a similar view of the ‘physical injury’ provision has been soundly rejected by at least one California appellate court, in F & H Const. v. ITT Hartford Ins. Co. of Midwest, 118 Cal. App. 4th 364 (2004). In F & H the court stated that, where property damage is defined in a policy as “physical injury to tangible property,” the “mere incorporation of a defective but functioning [product] that might fail in the future [does] not constitute ‘property damage.’” See id. at 376. Rather, “physical injury” should be given its plain meaning, and should connote “damage to tangible property causing an alteration in appearance, shape, color or in other material dimension.” Id. To that end, and in considering under the facts before it whether certain lower grade pile caps that were welded to driven piles constituted ‘physical injury to tangible property’ (where the only injury shown was the welded structure’s failure to perform as intended), the F&H court held that no physical injury was stated under the policy at issue. Id.

The court finds this reasoning persuasive here. The parties do not dispute that there was no actual physical damage to the fruit itself (as a result of Silgan’s faulty pull-tab lids) that caused an alteration in appearance, shape, color, or other material dimension. See SUF, ¶¶ 35-36. As such, the only injury being asserted and/or proven here is the failure of Silgan’s cans to perform as intended. Under the plain meaning that should be given the

1 phrase “physical injury” under the foregoing case law, the asserted damage to Del Monte’s
2 fruit does not therefore qualify as “physical injury to tangible property” under the National
3 Union policy.

4 Moreover, while plaintiff’s cited “incorporation” cases do suggest that ‘physical injury
5 to tangible property’ *can* occur where one product contaminates a larger product, or
6 somehow critically affects it, those cases are further distinguished by the fact that each
7 involved a hazardous contaminant. Indeed, as defendant points out, California district court
8 cases have subsequently noted that Watts, and its precursor cases, involved “a unique line
9 of cases involving inherently dangerous products that damage the host product by the mere
10 fact of incorporation.” See Semtech Corp. v. Royal Ins. Co. of Am., 2005 WL 6192907, *7
11 (C.D. Cal. 2005). This is simply not the case here, where the only potential ‘contaminant’ is
12 a defective pull-top lid. And while plaintiff asserts that the defective pull-tops had the “clear
13 potential to cause bodily injury,” there is no evidence actually demonstrating this to be the
14 case – only one or two generic complaints that children could not easily open the cans or
15 that “someone could get hurt.” See SUF, ¶¶ 10-11.

16 In sum, the case at bar implicates no inherently dangerous product incorporated into
17 another, nor did it give rise to any alteration in appearance, shape, or color of Del Monte’s
18 fruit, or in other material dimension. Accordingly, the court concludes that, pursuant to the
19 guidance provided by California case law, Del Monte’s loss of fruit does not qualify as
20 “tangible property” that was “physically” injured, within the meaning of the policy.

21 Plaintiff may yet, and does,³ rely upon the second remaining definition of “Property
22 Damage” – i.e., “loss of use of tangible property that is not physically injured” – for proof
23 that Del Monte’s loss of fruit is covered under the terms of the National Union policy.
24 Ultimately, however, plaintiff’s arguments in this vein are also unavailing.

25
26 ³ While plaintiff’s moving and opposition briefs do not fully make clear that plaintiff
27 intends to rely on the alternative “loss of use” provision to invoke coverage for “Property
28 Damage” under the policy, plaintiff’s counsel made clear at the hearing on the matter that
plaintiff does, in fact, rely on this provision.

1 The Ninth Circuit has relatively recently considered “loss of use” claims in the
2 context of policy language expressly defining “property damage” as that which includes
3 “loss of use of tangible property that is not physically injured,” as is the case here. See,
4 e.g., Sony Computer Entertainment America Inc. v. American Home Assur. Co., 532 F.3d
5 1007, 1018-19 (9th Cir. 2008). In Sony Computer, the Ninth Circuit considered what it
6 deemed “classic ‘loss of use’” claims and noted that such claims occur where “the insured's
7 defective property rendered the property of a third party unusable.” See id. at 1019. See
8 also Anthem Elecs., Inc. v. Pac. Employers Ins. Co., 302 F.3d 1049, 1057 (9th Cir.2002)
9 (defective circuit boards inserted into scanners of third party plaintiff rendered scanners
10 unusable); Hendrickson v. Zurich American Ins. Co., 72 Cal. App. 4th 1084, 1091-92
11 (1999)(defective strawberry plants planted in fields caused loss of use of fields). Because
12 the insured’s defective property in Sony was not alleged to have rendered a third party’s
13 discs wholly unusable, but merely unusable in conjunction with the insured’s defective
14 property, no “loss of use” claim was implicated. See Sony, 532 F.3d 1018-19.

15 Applying these “loss of use” guidelines here, defendant correctly notes that plaintiff
16 has failed to come forward with any undisputed facts firmly establishing that the fruit
17 contained within the defective pull-tab lid cups was completely “unusable.” To be sure,
18 plaintiff has demonstrated the undisputed fact that Del Monte did not want “to risk selling
19 the subject fruit cups to the public” because of the high rate of pull-tab lid failures, and that
20 Del Monte determined “that the cost of attempting to salvage the fruit packaged within the
21 pull-tab lid cans by repacking it in new, non-defective cans would exceed the value of the
22 fruit.” See SUF, ¶¶ 37-38. Notwithstanding these testaments to the exercise of Del
23 Monte’s business judgment, however, the court is unpersuaded that these facts suffice to
24 establish that the fruit itself was *unusable*. This is particularly true, given that it is
25 undisputed, as noted above, that the fruit itself did not appear altered or injured in any way.
26 Id. at ¶ 35.

27 Accordingly, without proof that the fruit itself was unusable, rather than proof that Del
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1 Monte made a business decision not to expend money on re-packaging the cans, plaintiff
2 has not satisfactorily discharged its burden to establish that Del Monte lost use of its
3 tangible property, such that qualifying "Property Damage" under the National Union Policy
4 occurred.

5 In sum, plaintiff has failed to demonstrate that Del Monte's loss of fruit constitutes
6 either "physical injury to tangible property" or "loss of use of tangible property that is not
7 physically injured." Accordingly, National Union's duty to pay for Del Monte's loss of fruit in
8 connection with Silgan's defective pull-tab lids is not triggered by the terms of the National
9 Union policy. Defendant's motion for summary judgment as to plaintiff's breach of duty to
10 pay is therefore GRANTED, and plaintiff's cross-motion as to the same cause of action is
11 DENIED.

12 2. Exclusions

13 Although the foregoing discussion effectively ends the inquiry regarding National
14 Union's duty to pay under the policy, the court finds it worthwhile to briefly consider the
15 parties' subsequent arguments regarding the applicability of any exclusions from coverage
16 (in the event that the court were to find that coverage exists), and to note that two of the
17 three exclusions relied upon by defendant would nonetheless likely bar at least certain
18 portions of plaintiff's claim from coverage. See SUF, Ex. 25 at § V(F, H).

19 First, as noted above, Exclusion F excludes from coverage any "Property Damage to
20 Your product arising out of it or any part of it." See SUF, Ex. 25 at § V(F). As defendant
21 notes, courts applying California law have held that this exclusion bars coverage for
22 damage to the insured's own product and any damages incidental to the product's failure,
23 such as the cost of replacing the insured's product itself. See, e.g., Golden Eagle Ins. Co.,
24 103 F. 3d 750, 757 (9th Cir. 1996) ("an insured's faulty workmanship is not "property
25 damage" under California law"). Defendant is thus correct that this exclusion eliminates
26 coverage for any portion of Del Monte's claim that seeks recovery of damages
27 corresponding to the cost of Silgan's defective cans themselves (or the cost of replacing
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1 the cans).

2 Plaintiff, moreover, does not appear to dispute this, as it has not offered any
3 argument in opposition to application of this particular exclusion, and concedes in its own
4 opening brief that it is not seeking damages based on the cost of its own cans. The
5 amount of such cans is \$1,811,881.67. Thus, to the extent that defendant seeks a
6 judgment that plaintiff should be precluded from recovering approximately \$1.8 million
7 amount of can costs based on Exclusion F, defendant's motion is well-taken.

8 Second, defendant correctly contends that \$341,080.60 worth of costs that were
9 incurred in inspecting, gathering, sorting and segregating fruit cups that contained defective
10 pull-tab lids, are also precluded from coverage pursuant to Exclusion H. Exclusion H, as
11 noted above, precludes coverage for: "damages claimed for any loss, cost or expense
12 incurred by you or others for the loss of use ...removal or disposal of: (1) Your Product; (2)
13 Your Work; or (3) Impaired Property... if such... Property is withdrawn or recalled from the
14 market or from use by any person or organization because of a known or suspected defect,
15 deficiency, inadequacy, or dangerous condition in it."

16 While plaintiff's argument in opposition to defendant is less than clear, defendant's
17 reasoning is persuasive. For as it notes, the exclusionary provision's own wording applies
18 to costs incurred for the loss of use, withdrawal, recall, inspection, repair, and replacement,
19 etc. of the insured's own product (i.e., here, the defective pull-tab lids), where the product is
20 withdrawn or recalled from the market or from use because of a known or suspected
21 defect. Accordingly, the amount of costs incurred to segregate and dispose the fruit cups
22 with defective tabs, must be excluded from coverage.

23 In sum, the court concludes that, even in the event it were to find the affirmative
24 coverage provisions of the policy triggered by Del Monte's claim stemming from its loss of
25 fruit, Exclusions F and H would nonetheless apply to preclude coverage for those damages
26 amounts falling within the scope of those exclusions. Consistent with this conclusion,
27 defendant's motion for partial summary judgment with respect to both exclusionary
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1 provisions is GRANTED. To the extent plaintiff's cross-motion addresses the same
2 exclusions, plaintiff's motion is DENIED.

3 3. Exhaustion/Damages Issues

4 In view of the foregoing rulings, and because the parties' positions are less than
5 clear, the court declines to reach the parties' remaining arguments regarding the specific
6 amount of damages that could properly be claimed under the policy.

7 C. Conclusion

8 For the foregoing reasons, the court accordingly GRANTS defendant's motion for
9 partial summary judgment as stated herein, and DENIES plaintiff's cross-motion for partial
10 summary judgment.

11 The parties shall appear at a further case management conference on April 15,
12 2010, at 2:00 p.m. A joint case management statement must be filed one week in advance
13 of the conference, containing a proposal for the resolution of the issues remaining in this
14 case.

15 **IT IS SO ORDERED.**

16 Dated: March 29, 2010



17 _____
18 PHYLLIS J. HAMILTON
19 United States District Judge
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